Catholic University Law Review

Volume 26
Issue 4 *Summer 1977*

Article 9

1977

Schools and School Districts

F. John Oshoway

CASENOTES

SCHOOLS AND SCHOOL DISTRICTS—State Legislature's Exclusion of School Systems from Municipal Government Consolidation Constitutes Unconstitutional Public School Segregation Requiring an Interdistrict Remedy. *United States v. Board of School Commissioners*, 541 F.2d 1211 (7th Cir. 1976).

In 1954, the United States Supreme Court declared that segregation of public school children solely on the basis of race is a deprivation of equal protection as guaranteed by the fourteenth amendment to the Constitution.[1] In the school desegregation decisions which followed, the Court gave federal courts broad remedial powers to eliminate school segregation that was the result of state action.[2] Recently, however, the Court limited these equitable powers in the area of school desegregation when it ruled that federal courts may not require desegregation plans which cross the boundaries of separate, autonomous school districts when de jure segregation is confined to only one of the districts.[3] In short, interdistrict relief may not ordinarily be afforded for purely intradistrict violations. While this rule is not absolute,[4] subsequent

1. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

2. *See, e.g.*, Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1 (1971) (in formulating remedies, courts may examine racial quotas, attendance zones, and pupil transportation); Green v. County School Bd., 391 U.S. 430 (1968) (district court must retain jurisdiction until state imposed segregation is completely removed); Griffin v. County School Bd., 377 U.S. 218 (1964) (district court may enjoin county government's financial support of segregated private schools and order government to levy taxes to finance the operation of integrated public schools); Cooper v. Aaron, 358 U.S. 1 (1958) (courts should scrutinize whether program of school authorities will further earliest practicable desegregation); Brown v. Bd. of Educ., 349 U.S. 294 (1955) (district courts to retain jurisdiction to ensure effective transition to non-discriminatory school system).

3. *See* Milliken v. Bradley, 418 U.S. 717 (1974). De jure segregation is synonymous with state-sanctioned segregation. Segregation which is not the product of state action, nor attributable to the state is de facto. The distinguishing characteristic between de jure and de facto discrimination is the intent to discriminate. *See* Keyes v. School Dist. No. 1, 413 U.S. 189, 208-09 (1973); Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1, 17-18 (1971). *But see* Keyes v. School Dist. No. 1, 413 U.S. 189, 224 (1973) (Powell, J., concurring).

4. *See* Milliken v. Bradley, 418 U.S. 717, 746 (1974). *Accord*, Hills v. Gautreaux, 425 U.S. 284 (1976); Evans v. Buchanan, 393 F. Supp. 428 (D. Del.), *aff'd mem.*, 423 U.S. 963 (1975).

decisions by the Court have not fully articulated the interdistrict-intradistrict distinctions. Thus, the lower courts have received little guidance as to whether particular acts of de jure segregation demand interdistrict relief and whether principles established in single-district cases are applicable to multi-district litigation. In *United States v. Board of School Commissioners*,[5] the United States Court of Appeals for the Seventh Circuit provided an exception to the interdistrict restrictions by sustaining a school desegregation order that required busing of school children from Indianapolis to suburban Indianapolis schools where a consolidation plan for the governments of Indianapolis and its predominantly white suburbs excluded consolidation of the school systems. The case represents an attempt to blend the reasoning utilized in single-district school desegregation decisions with that followed by the Court in multidistrict cases. On certiorari, however, the Supreme Court vacated this decision and remanded the case to the Seventh Circuit for reconsideration in light of intervening Supreme Court decisions which addressed the issue of intent to discriminate.[6]

School Commissioners began in 1968 as a school desegregation suit brought by the Justice Department, which alleged racial discrimination in the operation of Indianapolis public schools. At trial, the district court found that the school board had been illegally operating a segregated school system both before and after the Supreme Court's 1954 ruling that public school segregation was unconstitutional.[7] The court concluded that through gerrymandering of school attendance zones,[8] segregation of faculty,[9] use of optional attendance zones,[10] and a pattern of school construction and site selection,[11] the school

---

5. 541 F.2d 1211 (7th Cir. 1976). The suit was brought by the United States Government in accordance with Section 407 of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000c-6(a), (b) (1970), which empowers the Attorney General to bring school desegregation suits on behalf of plaintiffs he deems unable to initiate and maintain appropriate actions.

6. 429 U.S. 1068 (1977). *See* notes 60-69 & accompanying text *infra*.

7. United States v. Bd. of School Comm'rs, 332 F. Supp. 655, 665-70, 677-78 (S.D. Ind. 1971).

8. *Id.* at 665, 667, 669-70. The court found that school children were assigned to schools distant from their homes when attendance at schools nearest their homes would have resulted in desegregation. *Id.* at 665. Similarly, school children were transferred and transported from overcrowded schools of one race to schools of the same race rather than to closer schools of a different race. *Id.* at 669.

9. *Id.* at 670.

10. *Id.* at 668.

11. *Id.* at 665, 667-69. The instances of this particular practice were numerous and varied. Additions were built at black schools and then black students attending predominantly white schools were zoned into them; the converse was done for white

board had violated its duty to provide an integrated school system. Consequently, the court enjoined the board from further acts of discrimination and ordered it to take affirmative steps to eliminate the segregation existing in the Indianapolis schools. In addition, the court ordered the United States to join the Indiana Attorney General and other school districts in the Indianapolis metropolitan area as codefendants so that the court might consider the propriety of interdistrict relief.[12] The Seventh Circuit unanimously affirmed the decision on appeal, finding that the acts of the defendant school board supported the inference that a clear pattern of purposeful racial discrimination existed.[13]

In a subsequent trial on the issue of proper relief,[14] the district court decided that the acts of de jure segregation practiced by the defendant school board could be imputed to the state because the Indiana Constitution placed public schools under the state's direct control and supervision.[15] Based upon evidence of accelerating white emigration from Indianapolis, the district court decided that an Indianapolis-only desegregation plan would not be durable.[16]

---

students attending predominantly black schools. *Id.* at 667. The school board also constructed additions to large, predominantly black schools when adding classrooms to smaller, white schools nearby would have resulted in desegregation. *Id.* New schools attended solely by one race were constructed adjacent to older schools attended by the other race. *Id.* at 668.

12. *Id.* at 679-80. As a result, 19 school corporations were added as defendants, nine of which were not within the boundaries of Marion County in which Indianapolis is located. United States v. Bd. of School Comm'r's, 368 F. Supp. 1191, 1195-96 (S.D. Ind. 1973).

13. United States v. Bd. of School Comm'rs, 474 F.2d 81, 84-88 (7th Cir.), *cert. denied,* 413 U.S. 920 (1973).

14. United States v. Bd. of School Comm'rs, 368 F. Supp. 1191 (S.D. Ind. 1973).

15. *Id.* at 1200-02 (citing IND. CONST. art. 9, § 1; art. 8, § 1).

16. The evidence indicated that whites emigrate to the suburbs at an accelerated pace as black pupil enrollment in public schools reaches a fixed percentage and that, if the remedy were limited to Indianapolis, the exodus would create a black majority in the city school system within three years. This is commonly known as the "tipping point" theory. According to the late Yale law professor, Alexander M. Bickel, "white flight" is dependent on the racial composition of the schools. Once the percentage of blacks in the schools reaches a certain percentage—the "tipping point"—whites begin to flee to the suburbs. Bickel, *Desegregation: Where Do We Go From Here?*, THE NEW REPUBLIC, Feb. 7, 1970, at 20. The proposition that white flight is a response to school desegregation has been a subject of much dispute. *See generally* J. COLEMAN, OFFICE OF EDUC., U.S. DEPT. OF HEALTH, EDUC. & WELFARE, EQUALITY OF EDUCATIONAL OPPORTUNITY (1966); Armour, *The Evidence on Busing*, PUBLIC INTEREST, No. 28 (1972). *But see* G. ORFIELD, SYMPOSIUM ON SCHOOL DESEGREGATION AND WHITE FLIGHT (1975) (limited publication available from Center for National Policy Review, Washington, D.C.). Mr. Orfield concludes that the current data on white flight is inconclusive.

Of greater importance to this article is the use of white flight evidence by the courts. In his opinion after the original trial on the merits, United States v. Bd. of School

The court therefore ordered the immediate enactment of a plan requiring the busing of black Indianapolis school children to suburban schools to provide interim relief. Because only the rights of black Indianapolis school children had been violated, however, the court refused to order the busing of white suburban school children. The court also refused to require specific legislation to end school segregation in Indianapolis permanently, unless the state legislature defaulted in its duty to propose and implement a workable plan. Instead, the court issued a supplemental memorandum to the legislature containing guidelines for appropriate relief.[17]

On appeal, the Seventh Circuit held that the district court had acted properly in finding that the state had an affirmative duty to desegregate the Indianapolis schools,[18] but that the inclusion in the desegregation order of school districts outside Marion County, the county in which Indianapolis is located, was both improper and excessive in light of the recent interdistrict restrictions promulgated by the Supreme Court.[19] Those constraints further prompted the Court of Appeals to remand the case for a determination as to whether a 1969 consolidation of the governments of Indianapolis and its Marion County suburbs, which excluded unification of the school systems,[20] was unconstitutional.[21]

On remand, after conducting a further evidentiary hearing, the district court determined that the express exclusion of city schools from consolidation

---

Comm'rs, 332 F. Supp. 655, 676-79 (S.D. Ind. 1971), and in his opinion after remand from the second appeal, United States v. Bd. of School Comm'rs, 419 F. Supp. 180, 184 (S.D. Ind. 1975), District Court Judge Dillin concluded that intradistrict relief would not be durable because evidence presented at trial indicated that the Indianapolis public school system was reaching the tipping point. Therefore, in the latter decision he ordered an interdistrict remedy, stating that while "white flight may not be used as an excuse for inaction; it may, however, supply the reason for a particular kind of action." *Id.*

17. United States v. Bd. of School Comm'rs, 368 F. Supp. 1191, 1223 (S.D. Ind. 1973). The guidelines addressed the issues of time for legislative response, the propriety of allowing school districts to remain separate and autonomous while participating in the remedy stage, the method and scope of allowable busing of school children, and possible financing arrangements for transporting pupils away from their own school districts. *Id.* at 1227-31.

18. United States v. Bd. of School Comm'rs, 503 F.2d 68, 80 (7th Cir. 1974).

19. *Id.* at 86. *See* notes 3 & 4 & accompanying text *supra.*

20. In 1969, after the initial suit had been filed but before it was argued, the Indiana General Assembly had passed legislation enabling the governments of Indianapolis and suburban Marion County to consolidate, but without mandating a concomitant unification of the school system. At the time of the creation of this new government entity (commonly known as Uni-Gov) 95% of the black residents of Marion County lived in Indianapolis, as did 50% of the white residents of the county. Black enrollment comprised 36% of the total Indianapolis public school enrollment. 541 F.2d at 1215.

21. The question was argued but not decided at trial. 332 F. Supp. at 675-76, 679.

under the plan was an abdication by the General Assembly of its affirmative duty to alleviate segregation within Indianapolis and was a sufficient hindrance to desegregation so as to warrant a limited interdistrict remedy.[22] Accordingly, the court ordered that a specified number of city students be transported to suburban schools to bring the percentage of black enrollment in those schools up to fifteen percent. In addition, the court enjoined the local housing authority from locating additional public housing units within the city because the court concluded that this practice had contributed to racial containment and had advanced school segregation.[23]

The Seventh Circuit sustained the district court order[24] over a stern dissent which stressed that recent Supreme Court decisions require that invidious racial purpose be demonstrated by more than disparate racial impact.[25] The court relied on decisions by the Supreme Court which established that school districts found to be operating illegal dual school systems may not contract their territories in order to avoid desegregation,[26] and that state legislatures

22. United States v. Bd. of School Comm'rs, 419 F. Supp. 180, 183 (S.D. Ind. 1975).

23. *Id.* at 186.

24. United States v. Bd. of School Comm'rs, 541 F.2d 1211, 1212 (7th Cir. 1976).

25. 541 F.2d at 1224 (Tone, J., dissenting). In dissent, Judge Tone concluded that the plaintiffs had not demonstrated the requisite discriminatory intent on the part of the legislature in its facilitation of Marion County consolidation through school system exclusion. This opinion was based upon the Supreme Court's decision in Washington v. Davis, 426 U.S. 229 (1976), which held that black applicants for police employment in the District of Columbia could not successfully claim that they had been the victims of racial discrimination solely because black applicants failed an entrance employment test at a significantly higher rate than whites. In *Washington*, the court noted that earlier civil rights decisions had not established "that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than another." *Id.* at 242.

Judge Tone's reading of *Washington* as requiring a demonstration of invidious intent is undoubtedly correct, but his application of that holding to the facts in *School Commissioners* appears overly broad, particularly in light of other language from that opinion which favorably cited a Supreme Court decision for the proposition that "in proper circumstances, the racial impact of a law, rather than its discriminatory purpose, is the critical factor" in determining whether there has been intent to discriminate. Washington v. Davis, 426 U.S. at 242, (citing Wright v. Council of the City of Emporia, 407 U.S. 451 (1972)). *See* notes 29-35 & accompanying text *infra*. Particularly important to the Court in *Washington* was the background of de jure segregation preceding school system withdrawal in *Emporia*. *See* 426 U.S. at 243. While not expressly stating its own methodology for finding creation of Uni-Gov to be discriminatory (and, therefore, by implication, purposely discriminatory), the majority's discussion in *School Commissioners* of the history of de jure segregation in Indianapolis suggests reasoning similar to that employed by the Supreme Court in reaffirming *Emporia* in *Washington*. *See* United States v. Bd. of School Comm'rs, 541 F.2d 1211, 1215-20 (7th Cir. 1976).

26. Wright v. Council of City of Emporia, 407 U.S. 451 (1972); United States v. Scotland Neck Bd. of Educ., 407 U.S. 484 (1972).

may not exclude school districts from statewide school reorganization plans if the exclusions make the attainment of school desegregation more difficult than the attainment of other related governmental ends.[27] Thus, the court ruled that the Indiana General Assembly, by enacting legislation which facilitated exclusion of Marion County schools from governmental consolidation, had attempted to evade its duty to dismantle the dual school system in Indianapolis.[28]

To reach the decision that the state's actions required interdistrict relief, the appellate court had to find either that the discriminatory actions taken by the school board and the state prior to Marion County consolidation were interdistrict in character or that the exclusion of schools from consolidation was an interdistrict violation on its own. In order to determine whether the factual circumstances in *School Commissioners* supported either conclusion, a basic understanding of the standards for obtaining interdistrict school desegregation relief is required.

I. The Boundary Manipulation Decisions

Among the numerous devices utilized by state and local governments to avoid court-ordered public school desegregation has been manipulation of school district boundaries. The Supreme Court faced the boundary manipulation issue in *Wright v. Council of the City of Emporia*[29] and *United States v. Scotland Neck Board of Education*,[30] companion cases which raised the question of whether federal courts may enjoin state and local officials from fashioning a new, smaller school district from an existing district that has not completed the process of dismantling a dual system. In *Emporia*, the Court reinstated a district court's injunction, which had been issued to prevent officials of the city from separating their school system from that of the surrounding county, because the proposed withdrawal would have increased segregation in the remainder of the county school system.[31] The court reasoned that "[s]ince the city and county constituted but one unit for the purpose of student assignments during the entire time that the dual school system was maintained," they had been properly considered as a unit for the purpose

27. Evans v. Buchanan, 393 F. Supp. 428 (D. Del. 1975), *aff'd mem.*, 423 U.S. 963 (1975).

28. *See* note 20 *supra*.

29. 407 U.S. 451 (1972).

30. 407 U.S. 484 (1972).

31. 407 U.S. at 462. The Court stated that "[t]hough the *purpose* of the new school districts was found to be discriminatory [in previous school desegregation cases, the] holdings rested not on motivation or purpose, but on the *effect* of the action upon the dismantling of the dual school systems involved." (emphasis in the original).

of dismantling that system;[32] therefore, a finding that the city would be operating a dual system after its withdrawal was unnecessary.[33] Moreover, the Court eschewed any need to determine whether the dominant purpose behind the proposed withdrawal was racial so long as the effect of the action was to impede desegregation of the county school system.[34] Four Justices dissented, primarily because the city and county each would have been operating a unitary system after the withdrawal and because the proposed establishment of the Emporia system was not motivated by invidious racial considerations.[35]

In *Scotland Neck*, the same reasoning employed by the majority in *Emporia* was utilized to reinstate an injunction issued by a district court to prohibit the North Carolina legislature from creating a new school system from part of an existing system that was under a desegregation order. As in *Emporia*, the legislature's action would have impeded desegregation of the existing school system. Unlike *Emporia*, however, the decision was unanimous, with the *Emporia* dissenters unwilling to ascribe a nondiscriminatory motive to the defendants. The *Emporia* dissenters distinguished the two cases on the basis that a history of independent governmental operation of the city and county existed in *Emporia*, while no similar history existed in *Scotland Neck*. Taken together, the *Emporia* and *Scotland Neck* decisions stand for the proposition that new, smaller school systems may not be created from school systems under present desegregation orders when the effect is to inhibit the transformation from a dual to a unitary system.

II. Constitutional Standards for Interdistrict Relief

A. The Evolution of *Milliken v. Bradley*

Prior to 1972, the Supreme Court had not been faced with a federal court school desegregation decision mandating interdistrict relief for acts of de jure segregation. The *Emporia* and *Scotland Neck* decisions had encouraged civil rights activists to believe that when faced with the problem, the Court would continue to grant federal courts broad equitable powers to reshape school district boundaries. In the first interdistrict school desegregation case, *Bradley*

32. *Id.* at 459-60.

33. *Id.* at 459.

34. The Court characterized such an inquiry as being "as irrelevant as it is fruitless." *Id.* at 462. In light of its decision in Washington v. Davis, 426 U.S. 229 (1976), the Court now appears to be saying that what was once fruitless is now ripe. *See* notes 60-66 & accompanying text *supra*.

35. 407 U.S. at 479, 482. The dissenters also believed that discriminatory purpose may not always be presumed solely from discriminatory effect, 407 U.S. at 483. This position was later to become law in Washington v. Davis, 426 U.S. 229 (1976).

v. School Board,[36] however, the Court split evenly over the issue of whether metropolitan school districts should be consolidated to remedy school segregation in the core city. The effect of the Court's treatment of the case was to sustain the Fourth Circuit's refusal to consolidate Richmond, Virginia with its suburbs. While recognizing that racial containment policies practiced by local, state, and federal officials had partially produced and perpetuated the exclusion of blacks from suburban housing,[37] the appeals court had declined to find the defendant school districts in violation of the Constitution since they were each operating unitary school systems, had not cooperated in creating or maintaining the racial differentiation between Richmond and its suburbs, and initially had not drawn the school district lines for invidious purposes.

The concern that *Bradley* foreshadowed a restriction of the federal courts' equitable powers was allayed somewhat by the Court's decision that same term in *Keyes v. School District No. 1*,[38] the first northern school desegregation case to reach the Supreme Court. In *Keyes*, the Court ruled that proof that racial segregation in one segment of a school district resulted from intentional acts by school officials would raise a rebuttable "common sense" presumption that similar segregation elsewhere in the district also resulted from intentional action by officials.[39] Although the Court recognized that a purpose or intent to segregate must exist in order to find acts violative of the Constitution,[40] it rejected the notion that such motive must be shown at each school and in each area sought to be desegregated. *Keyes*, therefore, added an element to the school desegregation equation which, if applicable to multidistrict situations, would circumvent the possible restrictions to interdistrict relief posed by *Bradley*.

The Supreme Court's 1974 decision in *Milliken v. Bradley*,[41] however, rejected application of the *Keyes* presumption to multidistrict situations and established what are now the standards for interdistrict relief. A five member majority of the Court ruled that a federal district court may not require an interdistrict remedy for intradistrict de jure segregation unless the violations are shown to have had substantial adverse effects in districts other

---

36. Bradley v. School Bd., 462 F.2d 1058 (4th Cir. 1972), *aff'd sub nom.* School Bd. v. State Bd. of Educ., 412 U.S. 92 (1973). For an extensive discussion of the Richmond litigation, see Leedes and O'Fallon, *School Desegregation in Richmond: A Case History*, 10 U. RICH. L. REV. 1 (1975).

37. *Id. See* Bradley v. School Bd., 462 F.2d at 1065, 1070.

38. 413 U.S. 189 (1973).

39. *Id.* at 201-03, 208.

40. *Id.* at 208.

41. 418 U.S. 717 (1974).

than where they occurred.[42] Inclusion in the remedial order of school districts whose racial compositions were not the product of state action, reasoned the Court, would exceed the powers of the federal courts to grant relief that is commensurate with the constitutional violation. In short, the Court decided that "the scope of the remedy is determined by the nature and extent of constitutional violation."[43] In his opinion for the Court, Chief Justice Burger noted that the record of the district court was barren of any finding that the defendant school systems, other than Detroit, had operated dual school systems or that the Detroit violations caused school segregation in any other defendant school district. There was a similar absence of evidence that boundary lines of the affected school districts had been estabished to foster segregation in the schools. Nor had the majority of the school districts included in the remedial order been given a meaningful opportunity to present evidence or be heard on the issues of the propriety of multidistrict remedy and the existence of a constitutional violation. Earlier school desegregation decisions by the Court were interpreted to have established merely that injured plaintiffs are entitled to be restored to the position they would have occupied in the absence of discrimination, and that right ordinarily is to attend a unitary school system in the district where the violation(s) occurred.[44] The Chief Justice cautioned, however, that interdistrict remedies would be in order in future cases when constitutional violations produce more than de minimus segregation in other districts[45] or when boundary lines are deliberately drawn on the basis of race.[46]

Mr. Justice Stewart, whose concurrence provided the deciding vote for reversal, expanded the majority's list of illustrations by adding that interdistrict relief would also be warranted if state officials "have contributed to the separation of the races by drawing or redrawing school district lines"[47] or "by purposeful, racially discriminatory use of state housing or zoning laws."[48] Apparently, Mr. Justice Stewart and the majority agreed that inter-

42. *Id.* at 744-45. Under this standard, a constitutional violation in more than one district would not necessarily require an interdistrict remedy without evidence either that such violations were substantially interrelated, or that there was a significant segregative effect in another district.

43. *Id.* at 744. Here, the Court employed a proposition first articulated in Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971). In *Swann*, interestingly enough, the same principle was used as a basis for a liberal application of equitable powers.

44. 418 U.S. at 746.

45. *Id.* at 745.

46. *Id.*

47. 418 U.S. at 755 (Stewart, J., concurring).

48. In *Milliken*, as in *Bradley*, the Court was presented with substantial evidence

district relief for the acts of a single governmental entity may be granted only if the acts can be shown to be intentionally discriminatory and a substantial cause of the racial composition of the other schools included in the remedial order. A potentially crucial distinction between the majority's standard of proof and that of Justice Stewart may exist where boundary manipulation is alleged. Since the majority's opinion requires deliberate sketching of district lines on the basis of race, plaintiffs apparently must establish discriminatory intent by defendants, a position similar to that taken by the same four Justices in their earlier *Emporia* dissent. Conversely, Justice Stewart would require only that there be disparate racial effect in order to establish racial motive, since he indicated that interdistrict relief may be suitable when state officials have merely advanced racial separation by sketching school district lines.

The scope of the *Milliken* restrictions has since been considered by the Court. In *Evans v. Buchanan*,[49] the Court summarily affirmed the order of a three-judge district court requiring the submission of interdistrict school desegregation plans for Wilmington, Delaware and its suburbs. The district court had found that a 1968 act authorizing the State Board of Education

---

that housing discrimination by federal and state officials and by officials of the defendant jurisdictions effectuated the segregated housing conditions in Detroit and its suburbs. *See generally* Record, vol. 2, Milliken v. Bradley, 418 U.S. 717 (1974); *see also* Taylor, *Desegregating Urban School Systems After Milliken v. Bradley*, 21 WAYNE ST. L. REV. 751, 765-69 (1975). However, because the Sixth Circuit had not relied upon that evidence to reach its decision, the Court refused to consider the housing proof. 418 U.S. at 728 n.7. Of the Justices who voted for reversal in *Milliken*, only Mr. Justice Stewart felt compelled to examine the housing evidence presented by plaintiffs, and he found the proof insufficient to demonstrate that either the racial composition of the Detroit schools or the residential patterns within Detroit were caused by governmental activity, 418 U.S. at 756 n.2 (Stewart, J., concurring).

Commentators disagree as to whether the Court's decision to ignore the respondent's housing proof was fatal to respondent's case. One view asserts that the housing proof was intentionally deemphasized in appellate argument and brief by respondent's counsel because there was little legal precedent for utilizing housing evidence in a school desegregation lawsuit. *See* Beer, *The Nature of the Violation and the Scope of the Remedy: An Analysis of Milliken v. Bradley in Terms of the Evolution of the Theory of the Violation*, 21 WAYNE ST. L. REV. 903, 904-08 (1975); *accord*, 3 HOFSTRA L. REV. 487, 490 n.13 (1975). *But see* West, *Another View of the Bradley Violation: Would a Different Evolution Have Changed the Outcome?*, 21 WAYNE ST. L. REV. 917 (1975). On the other hand, at least one commentator asserts that the refusal to consider evidence not relied upon by the appeals court is a reversal of longstanding Supreme Court practice. *See* Taylor, *supra*, at 746 n.48.

49. 423 U.S. 963, *aff'g mem.*, 393 F. Supp. 428 (D. Del. 1975). The district court relied primarily on the decision in Hunter v. Erickson, 393 U.S. 385 (1969), in which the Supreme Court invalidated an amendment to a city charter because it treated racial housing matters differently from other racial and housing subjects by making them subject to voter referendum.

to reorganize school districts statewide but excluding the predominantly black Wilmington school district from the reorganization was unconstitutional when coupled with the state's history of de jure segregation. *Milliken* was distinguished on two grounds. First, Delaware, unlike Michigan, had a history of state-mandated school segregation.[50] Second, evidence presented at trial in *Evans* established that federal, state, and local officials had engaged in housing discrimination under guise of law.[51] Both differences were considered to be interdistrict violations by the district court. Thus, when the court found further that the school reorganization act had made Wilmington school desegregation more difficult, it ordered the consideration of interdistrict remedies.

In *Hills v. Gautreaux*,[52] a unanimous Court upheld an order by the Seventh Circuit requiring an Illinois district court to consider metropolitan housing relief for acts of racial discrimination by both the Chicago Housing Authority (CHA) and the United States Department of Housing and Urban Development (HUD). CHA was found at trial to have violated the fourteenth amendment by perpetuating and exacerbating residential segregation in Chicago and its suburbs through its selection of tenants and sites for public housing,[53] whereas HUD was found to have violated the fifth amendment by funding the CHA selected housing projects, although cognizant that the projects were being selected and administered in a discriminatory fashion.[54] The district court had deemed consideration of metropolitan relief unwarranted, but a unanimous Supreme Court disagreed. The Court regarded *Milliken* as an expression of equitable principles governing the federal courts, and it restricted those courts to fashioning relief which inconvenienced only those individuals or legal entities which have been implicated in the constitutional violation.[55] Since CHA and HUD both had been found guilty of constitutional violations metropolitan in scope, consideration of metropolitan relief was not only proper, but necessary.[56] From the lan-

50. 393 F. Supp. at 432.

51. *Id.* at 434-35.

52. 425 U.S. 284 (1976).

53. *Id.* at 287-88. CHA had engaged in a consistent practice of seeking approval for proposed sites from the alderman in whose ward the site was located. Any site vetoed by the alderman was withdrawn from further consideration by CHA. This policy had resulted in rejection of 99% of the units proposed for white areas.

54. *Id.* at 289.

55. *Id.* at 293-94. Mr. Justice Stewart went on to write that "[n]othing in the *Milliken* decision suggests a *per se* rule that federal courts lack authority to order parties found to have violated the Constitution to undertake remedial efforts beyond the municipal boundaries of the city where the violation occurred." *Id.* at 298.

56. *Id.* at 297.

guage of the opinion and from the facts of the case, however, it is clear that the Justices did not consider *Gautreaux* to be an interdistrict case, because HUD's authorization to operate throughout the Chicago metropolitan area housing market made the metropolitan area a single entity for purposes of determining relief.[57] Furthermore, the Court expressly rejected the proposition that location of public housing close to heavily black census tracts constituted evidence of suburban discrimination justifying interdistrict relief.[58]

The Supreme Court's affirmance of the district court decision in *Evans v. Buchanan* makes it clear that *Milliken* did not entirely prohibit interdistrict remedies. It further suggests that under *Gautreaux*, a multidistrict action may, under appropriate circumstances, be amenable to single-district principles and analysis.[59] The absence of a majority opinion in *Evans*, however, coupled with the ease by which *Gautreaux* lends itself to single-district analysis, left unanswered several questions posed by the *Milliken* decision. The principal issues still facing the federal courts were whether particular acts of de jure segregation require interdistrict remedies and whether the same reasoning employed in earlier decisions may be used in the multidistrict setting.

B. The Intent Cases

School Commissioners was vacated and remanded by the Supreme Court in light of two recent decisions focusing on the evidentiary showing necessary to demonstrate intent to discriminate, *Washington v. Davis*[60] and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*[61] In *Washington*, decided before the Seventh Circuit's decision in *School Commissioners*,[62] the Supreme Court held that a written entrance examination given

57. HUD could construct federal government housing in the metropolitan area without the approval of the local governments. *Id.* at 304 n.21.

58. *Id.* Ultimately, the import of this rejection may be insignificant since the Court recognized that the evidence was being offered merely to show the scarcity of integrated public housing in the Chicago metropolitan area and not to show discriminatory motive.

59. Apparently neither *Evans* nor *Gautreaux* mandate the imposition of interdistrict remedies for interdistrict violations, since the point was not addressed by the district court in *Evans*, and *Gautreaux* was arguably not an instance of interdistrict violation. The Court thereby seems to have left the question of interdistrict relief to the discretion of the federal courts, with the proviso that such remedies must be considered when interdistrict violations are found. *Evans* and *Gautreaux* also are silent on the issue of whether an interdistrict violation may be established in a school desegregation suit by the adduction of evidence of housing discrimination.

60. 426 U.S. 229 (1976).

61. 429 U.S. 252 (1977).

62. *Washington* was discussed extensively in the *School Commissioners* dissent. *See* note 25 *supra.*

to all applicants for the District of Columbia Metropolitan Police Department was not racially discriminatory even though it excluded blacks at a disproportionately higher rate than whites. The court declared that statistically disproportionate racial impact alone does not establish purpose or intent to segregate, an essential element of de jure segregation.[63] Although the Court recognized that invidious discriminatory purpose may often be inferred from the particular facts, including disparate racial effect, it denied that it previously had determined "that a law, neutral on its face and serving ends otherwise within the power of goverment to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another."[64] In a moment of judicial understatement, the Court conceded that other of its cases contain language to the contrary.[65] *Emporia* was specifically cited as one such decision.[66] The Court, however, distinguished that case by noting that it, unlike *Washington*, involved an unremedied constitutional violation. While the Court did not directly address those portions of the *Emporia* opinion which rejected as irrelevant for a finding of de jure segregation an investigation into the dominant purpose behind state action, in order to reconcile the *Emporia* and *Washington* decisions the Court must have accepted as proper the utilization of the effects test when there is preexisting de jure segregation. However, it must have rejected that approach when the alleged discrimination was unaccompanied by an antecedent constitutional violation.

In *Arlington Heights*, the Court expressly affirmed its holding in *Washington* that official action is not unconstitutional solely because it has a racially disparate impact.[67] Because it was found that the plaintiffs had adduced insufficient evidence to demonstrate that officials of the predominantly white village were motivated by racial considerations, the Court determined that the officials had not engaged in racial discrimination by refusing to grant a zoning change which would have allowed the construction of integrated low-

63. The Court quoted language from Keyes v. School Dist. No. 1, 413 U.S. 189, 205, 208 (1973) in support of this proposition. In *Keyes*, however, the Court was willing to infer that racial disparity in the schools located in one portion of a school district was the result of de jure segregation when such segregation had been proven in another portion of the same district. While that inference is technically not inconsistent with the holding of *Washington*, it does present another instance where the Court has utilized an initially expansive principle in a restrictive fashion. *See also* note 43 *supra*.

64. 426 U.S. at 242.

65. *Id.*

66. *Id.* at 243.

67. 429 U.S. at 264-65.

and moderate-income housing. The Court did clarify its language in *Washington*, however, by stating that judicial deference to the decision making process would not be in order when there was proof that a decision by a legislature or administrative body had been motivated by "*a* discriminatory purpose."[68] Recognizing that few situations exist in which there is overt evidence of discrimination in the decision-making process, the Court identified sources of inquiry to pursue in determining whether legislative or administrative action is racially discriminatory. Among the sources mentioned were the historical background of the decision, the sequence of events leading to the decision—especially if the succession of events deviate from the norm or are taken in a manner that clearly implies that they were racially motivated—and the legislative or administrative history of the decision.[69]

As a result of *Washington* and *Arlington Heights*, civil rights plaintiffs must now affirmatively demonstrate that invidious racial purpose, rather than disparate racial effect, accompanies official action. It appears, however, that a demonstration of disparate racial impact alone will be sufficient to shift the burden of proof to the defendant when state action which produces racial disparity is preceded by official racial discrimination.

III. SCHOOL COMMISSIONERS: *Milliken* CONSTRUED

The operative facts in *School Commissioners* were found by the Seventh Circuit to be similar in kind to those in *Evans*.[70] In both cases, state senates enacted legislation which excluded school systems with large black populations from schemes which likely would have facilitated school desegregation. Relying principally on the reasoning of *Evans*, the Seventh Circuit ruled this exclusion unconstitutional because it made desegregation of Indianapolis public schools more difficult to achieve than other goals satisfied by consolidation. Since *School Commissioners* was factually analogous to *Evans*, which established that suspect racial classifications may be created when statutes not

68. *Id.* at 265-66 (emphasis added). The Court's language implies that even if racial concerns instigate legislative or administrative action less than do other factors, any evidence of racial motivation in such action is sufficient to shift the burden of proof to the defendants.

69. *Id.* at 267-68. The legislation in *School Commissioners*, which enabled consolidation to proceed without including the respective school systems, might come within the *Arlington Heights* proscriptions since previous municipal consolidation in Indiana had to include the respective school systems. At odds with that conclusion is the Seventh Circuit's failure to find any racial motivation behind the passage of that combination of legislation. *See* 541 F.2d at 1220-21.

70. 541 F.2d at 1222.

explicitly addressing racial matters have a pronounced racial effect,[71] the Seventh Circuit concluded that the Uni-Gov legislation's effective preclusion of interdistrict desegregation demanded a limited interdistrict remedy.[72]

The Seventh Circuit also found other support for its decision to provide interdistrict relief. As in *Keyes*, acts of de jure segregation by the defendants imposed the duty on the state to desegregate the schools of Indianapolis.[73] As in *Gautreaux*, the Indianapolis housing authority was empowered to locate public housing outside Indianapolis without voter approval but had chosen not to exercise that power.[74] Also, the defendant suburban jurisdictions had been given the option to accept low income housing for families but had rejected all such proposals.[75] Finally, the court found that the suburban governments had made non-inclusion of the schools in the Uni-Gov plan politically expedient.[76] The court perceived the combination of these actions and the creation of Uni-Gov to be interdistrict violations under *Milliken* because they exhibited deliberate redrawing of school district lines, purposeful racially discriminatory use of state housing laws, and involvement of the suburban jurisdictions in the effort to discriminate. These offenses, concluded the court, contributed to the separation of the races and had significant segregative impact on the pupil composition of other Marion County school districts. Consequently, the Seventh Circuit affirmed the district court's remedial order. The Supreme Court's subsequent vacation of the *School Commissioners* case and a closer examination of the Seventh Circuit's opinion, however, suggest that the imposition of interdistrict relief may be inappropriate.

In the first place, the context in which consolidation presented a violation in *School Commissioners* is not exactly the same as that present in *Evans*. In *Evans* there had been antecedent statewide segregation in the public schools created by state statutes. There also had been cooperation between Wilmington and its suburbs to maintain and increase that segregation in the Wilmington schools and a history of discriminatory public housing policies practiced in the Wilmington metropolitan area.[77] Under the *Milliken* stand-

71. 393 F. Supp. at 441.

72. 541 F.2d at 1222. Uni-Gov is explained in note 20 *supra*.

73. A 1949 act passed by the Indiana General Assembly requiring phased-in desegregation ended Indiana's official policy of segregation. 1949 Ind. Acts, ch. 186, p.603.

74. 541 F.2d at 1216-17.

75. *Id.* at 1216. This option ended with the creation of Uni-Gov in 1969. Before that date all but one of the public housing projects had been built. Since 1969, authority to construct public housing throughout Marion County has rested with the Indianapolis Housing Authority.

76. *Id.* at 1221.

77. 393 F. Supp. at 433-37.

ards both the statutory de jure segregation and the efforts by the governments of Wilmington and its suburbs to maintain segregation would be interdistrict violations.[78] Thus, in *Evans*, a condition of unremedied interdistrict segregation was present prior to statewide school reorganization since the state of Delaware had not completed the desegregation of the Wilmington school district. School reorganization excluding Wilmington and thereby foreclosing interdistrict desegregation of the Wilmington school system was therefore a further abdication by the state of its duty to desegregate the Wilmington schools.

In *School Commissioners*, on the other hand, the segregative acts of the State and the School Commission before consolidation were confined to Indianapolis and there was no history of state-wide de jure segregation, although there was evidence of private and official discrimination in the sale of housing as well as evidence of official discrimination in the location of public housing. Yet, it is arguable that these two categories of housing violations cited by the district court were not constitutional violations at all. The first, suburban refusal to accept public housing, was not deemed a violation by the Fourth Circuit in *Bradley*[79] and expressly was not considered by the Supreme Court in *Milliken*.[80] The second, failure of the housing authority to build public housing outside Indianapolis, would not likely be deemed "significant" by the Supreme Court since approval by the suburban jurisdictions was required during the selection of ten of the eleven project sites.[81] Hence, it must primarily be the creation of Uni-Gov alone that transforms the otherwise intradistrict violations into an interdistrict violation.[82]

The absence of a Supreme Court opinion in *Evans*, however, left unanswered the question of whether school reorganization, in and of itself, was an interdistrict violation or whether it was only an interdistrict violation when found in conjunction with other interdistrict violations. Whether consolida-

78. The Supreme Court did not consider the housing issue in *Milliken*. *See* 418 U.S. at 728 n.7.

79. Bradley v. School Bd., 462 F.2d 1058 (4th Cir. 1972), *aff'd sub nom.* School Bd. v. State Bd. of Educ., 412 U.S. 92 (1973). *See* notes 36-40 *supra* & accompanying text.

80. 418 U.S. at 728 n.7.

81. Only one public housing project was erected after 1969. Before that time each jurisdiction within Marion County could veto public housing.

82. Furthermore, the Seventh Circuit tacitly rejected the idea that acts before the creation of Uni-Gov established an interdistrict violation since the court remanded the case after reviewing the district court's order for interdistrict relief to have the district court also determine if consolidation was an interdistrict violation. Had sufficient evidence been adduced to establish an interdistrict violation, there would have been no need for remand.

tion could transform an otherwise intradistrict offense into an interdistrict one is, therefore, an untested proposition. The *School Commissioners* case may have answered that question affirmatively by treating the general assembly's conduct in facilitating school system exclusion from Marion County consolidation as forestalling interdistrict desegregation of Indianapolis schools. If, as this casenote has suggested, there was no substantial interdistrict violation preceding the creation of Uni-Gov, then consolidation alone has converted *School Commissioners* from an intradistrict case into an interdistrict one. Assuming arguendo that this reasoning would be acceptable to a majority of the Supreme Court, the remedy imposed for the constitutional violations would still seem unjustified.

In *Milliken*, the Supreme Court indicated that those injured by unlawful discrimination are to be returned to the status they would have attained absent the discrimination. In *School Commissioners* that principle apparently would dictate that the consolidation be voided and that the plaintiffs be returned to the status they would have occupied had there been no consolidation. Indianapolis school children, therefore, should be allowed to attend unitary schools in Indianapolis, and that result should not be altered simply because the district court found that intradistrict relief would be ineffective.

Remand by the Supreme Court undoubtedly will force the Seventh Circuit to reassess its *School Commissioners* decision. An obvious conclusion for the court to draw is that it must decide whether the consolidation legislation was racially motivated under the standards enunciated in *Washington* and *Arlington Heights*. The Supreme Court might also intend that the other violations found by the Seventh Circuit be examined for racial purpose. To properly pursue these inquiries the Seventh Circuit may need to remand the case to the district court for further evidentiary hearings. Examination of legislative intent by the circuit court, however, would seem to be secondary to a determination of whether there was interdistrict discrimination prior to consolidation. With a foundation of preexisting interdistrict discrimination, the evidence that segregation has increased since consolidation would mandate an interdistrict remedy. On the other hand, a finding that there previously was only intradistrict segregation in Indianapolis, coupled with the district court's prior determination that consolidation was not racially motivated, would confine the issue in *School Commissioners* to a determination of whether interdistrict relief may be granted for an act which has interdistrict effects yet lacks racially invidious purpose.

IV. Conclusion

The broad powers of federal courts to remedy de jure school segregation

were circumscribed by *Milliken v. Bradley*, which required a greater demonstration of discrimination to effect multidistrict remedies. However, subsequent action by the Court in *Evans* and *Gautreaux* indicated that *Milliken* does not proscribe all interdistrict relief. The peculiarities of those two decisions, however, left undefined the extent of the *Milliken* restrictions. The Court recently compounded the confusion in *Washington* and *Arlington Heights* by rejecting an effects test as the proper means of determining invidious purpose when previous de jure discrimination is absent.

The case of *United States v. Board of School Commissioners* demonstrates both that the effects test of *Emporia* still applies in appropriate circumstances and that housing remedies may be afforded for school desegregation. Although the court's command that a limited interdistrict remedy be utilized when intradistrict relief proves ineffective may not withstand judicial scrutiny, the court's treatment of the issues of intent and the relationship between housing discrimination and public school segregation may serve as guideposts in future civil rights litigation.

Gerald I. Fisher

CRIMINAL LAW—Because the Interstate Agreement on Detainers Act is the Exclusive Method for Transfer of Prisoners Between Jurisdictions for Trial, a Federal Writ of Habeas Corpus *Ad Prosequendum* is Equivalent to a Detainer. *United States v. Mauro*, 544 F.2d 588 (2d Cir. 1976).

The Interstate Agreement on Detainers Act[1] provides a procedure by which a jurisdiction with charges outstanding against a prisoner in another jurisdiction may obtain temporary custody of that prisoner for purposes of prosecution.[2] The Agreement requires that any jurisdiction employing its procedures comply with certain time limitations in bringing the prisoner to trial or suffer dismissal of the charges underlying the detainer.[3] When it enacted the Agreement in 1970, Congress did not consider the effect of the Agreement on the writ of habeas corpus *ad prosequendum*, the method tra-

1. 18 U.S.C. app. (1970).

2. The Agreement also provides a procedure by which a prisoner can clear charges against himself on which a detainer is based. 18 U.S.C. app. § 2, art. III (1970).

3. *Id.* § 2, art. V(c).

ditionally employed by federal prosecutors to obtain temporary custody of state prisoners.[4] In *United States v. Mauro*,[5] the United States Court of Appeals for the Second Circuit held that the federal writ is the equivalent of a detainer filed pursuant to the Agreement, and thus the procedures of the Agreement must be followed when the writ is used.[6]

The question of a possible conflict between the Agreement and the writ of habeas corpus *ad prosequendum* in *Mauro* arose out of an indictment issued by the Federal District Court for the Eastern District of New York against two prisoners incarcerated in New York prisons. Writs of habeas corpus *ad prosequendum* were issued to the wardens of the institutions directing them to bring the prisoners before the court. Following their arraignment, the defendants were returned to state custody while new writs for their trials were being issued. Prior to their return to federal court, however, both defendants moved for dismissal of their indictments on the ground that the United States had violated section 2, article IV(e)[7] of the Interstate Agreement on Detainers Act, which provides that if a jurisdiction with temporary custody of a prisoner pursuant to the Agreement returns that prisoner to the jurisdiction of his original incarceration without trial, the charges on which the prosecution is based must be dismissed. The same judge who had ordered the return to state custody granted the motions to dismiss,[8] and the government appeals were consolidated before the court of appeals.[9]

Speaking for the *Mauro* majority, Judge Mulligan rejected outright the government's argument that since detainers had not been filed in obtaining custody of the defendants, the terms of the Agreement, and particularly its

---

4. The writ of habeas corpus *ad prosequendum* is issuable by the federal courts pursuant to 28 U.S.C. § 2241(c)(5) (1970). This writ has been characterized as the "traditional and time-honored method employed by federal courts to obtain state prisoners for trial." United States v. Mauro, 544 F.2d 588, 591 (2d Cir. 1976), *cert. granted*, 46 U.S.L.W. 3183, No. 76-1596 (Oct. 3, 1977). *See also* United States v. Ford, 550 F.2d 732 (2d Cir. 1977), *cert. granted*, 46 U.S.L.W. 3183, No. 77-52 (Oct. 3, 1977) (per J. Mansfield, following *Mauro*, a writ of habeas corpus *ad prosequendum* used for transfer of custody after filing a detainer is a request for custody for purposes of the Agreement).

5. 544 F.2d 588 (2d Cir. 1976).

6. *Id.* at 592.

7. If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to article V(e) hereof, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

18 U.S.C. app. § 2, art. IV(e) (1970), *quoted in Mauro*, 544 F.2d at 591.

8. United States v. Mauro, 414 F. Supp. 358 (E.D.N.Y. 1976).

9. 544 F.2d at 589.

sanctions for noncompliance, did not apply.[10] Referring to the admittedly sparse[11] legislative history of the Agreement,[12] the court noted that the policy considerations supporting its enactment applied equally to detainers and to writs of habeas corpus *ad prosequendum*.[13] Permitting the United States to avoid the procedures and sanctions of the Agreement merely by using a writ of habeas corpus, argued the court, would eviscerate the purpose and intent of the Agreement.[14] The court rejected the argument that in view of the availability of the writ of *habeas corpus* to federal prosecutors, the Agreement was intended only to remedy problems which the states had in procuring federal prisoners.[15] The court affirmed the dismissal of the indictments by holding that a writ of habeas corpus *ad prosequendum* is a detainer for purposes of the Agreement.[16]

In a vigorous dissent, Judge Mansfield argued against equating the writ with a detainer.[17] He noted that the Agreement allows the governor of a sending state the discretion to refuse to honor a detainer,[18] whereas the writ of habeas corpus *ad prosequendum* is couched in mandatory language, and would be enforceable against a recalcitrant state under the supremacy clause of the United States Constitution.[19] Further, Judge Mansfield argued, the

---

10. *Id.* at 591-92.

11. *Id.* at 590. The court understated the situation remarkably well by noting that the legislative history is not "particularly enlightening." *Id.*

12. *See* S. REP. NO. 91-1356, 91st Cong., 2d Sess. (1970), 116 CONG. REC. 13999 (1970) and 116 CONG. REC. 38840 (1970).

13. 544 F.2d at 591-92.

14. *Id.* at 594-95.

15. The court argued that such a holding would require repealing those portions of the Agreement which clearly apply to the United States as a receiving jurisdiction. *Id.* at 593-94. The court further stated that its action did not amount to repeal of the habeas corpus statute since Alabama, Alaska, Mississippi and Oklahoma were not parties to the Agreement, and thus the writ was still needed for those states. *Id.* at 594. The legislative history of the Agreement, however, clearly contemplated that all of the states would shortly join in the Agreement. *See* 116 CONG. REC. 38841 (1970).

16. 544 F.2d at 592. "We conclude that the writ of habeas corpus *ad prosequendum* is a detainer entitling the state inmate to the protection provided in Article IV [of the Agreement] and specifically to a trial before his return to the state institution." *Id.* (footnotes omitted).

17. *Id.* at 595.

18. *Id.* at 597. The Agreement provides that within 30 days of receiving a request for transfer of custody of a prisoner, the governor may disapprove the request, "either upon his own motion or upon motion of the prisoner." 18 U.S.C. app. § 2, art. IV(a) (1970).

19. 544 F.2d at 595-96. The language of the writ appears to be mandatory in effect. It is directed to whomever has custody of the prisoner, and begins with the words "[y]ou are hereby commanded." It is arguable that this is merely an archaic form and connotes nothing of substance. *See* Annot., 5 L. Ed.2d 964, 966-68 (1961); *see generally*, R. SOKOL, FEDERAL HABEAS CORPUS (1969).

writ subverts neither the intent of the Agreement to mitigate the adverse effects of detainers on prisoners,[20] nor the purpose of the Agreement to provide the states with an adequate method for gaining temporary custody of federal prisoners.[21] Judge Mansfield concluded that detainers and writs of habeas corpus serve distinct and separate purposes without conflict, and that the majority's decision served to judicially repeal a time-honored federal procedure.[22]

I. Federal Access to State Prisoners for Purposes of Prosecution

Prior to enactment of the Agreement, state prisoners were available to federal prosecutors for trial through the issuance of the writ of habeas corpus *ad prosequendum*. Although the origins of the writ of habeas corpus are lost in antiquity,[23] the federal judiciary has been empowered to issue the writ since the signing of the Constitution.[24] In *Ex parte Bollman*,[25] Chief Justice Marshall discussed both the common law and statutory bases for issuance of writs of habeas corpus by the federal courts.[26] Noting that the term habeas corpus is generic, encompassing several species, including the "Great Writ" *ad subjiciendum*,[27] he proceeded to analyze section 14 of the Judiciary Act of 1789[28] to determine whether the Supreme Court was empowered to issue the writ, and if so, the nature and scope of the writ as applied to prisoners. Finding that the Act did empower the Court to issue the writ,[29] Chief Justice Marshall noted that its applicability to prisoners was limited to those already

20. 544 F.2d at 596-97. Because the writ is executed immediately and does not remain outstanding against a prisoner, Judge Mansfield argued, it does not hinder the prisoner's preparation of a defense, nor does it result in any loss of privileges. *Id.*

21. *Id.* at 597.

22. *Id.*

23. For a general discussion of the history and evolution of habeas corpus, *see* R. Sokol, Federal Habeas Corpus (1969). The writ of habeas corpus *ad prosequendum* is discussed in particular at § 4.5.

24. "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, § 9 cl. 2. *See also* Judiciary Act, ch. 20, § 14, 1 Stat. 73 (1789).

25. 8 U.S. (4 Cranch) 75 (1807).

26. *Id.* at 93-101. Chief Justice Marshall noted that while we look to the common law for the meaning of habeas corpus, the power to issue the writ must be found in written law. *Id.* at 93-94.

27. *Id.* at 95. This is the writ guaranteed by the Constitution. *See* note 24 *supra*. It permits the court to examine the legality of custody. Black's Law Dictionary 837 (4th ed. 1968).

28. Judiciary Act, ch. 20, § 14, 1 Stat. 73 (1789).

29. 8 U.S. (4 Cranch) at 94.

in federal custody or those needed to testify before a federal court.[30] The Chief Justice arrived at this conclusion following a discussion of the varieties of the writ of habeas corpus in the context of an interpretation of the Act, rejected by the Court, which would have severely limited the applicability of the writ to prisoners.[31] It is noteworthy that *Bollman* is often cited as authority for the proposition that federal courts cannot compel production of a state prisoner for trial on federal charges by a writ of habeas corpus *ad prosequendum*.[32] This reading of the case is apparently derived from language in the Court's discussion of the various auxiliary writs,[33] and it appears to have gone unnoticed that this issue was never actually before the Court in *Bollman*.[34] The prisoners were already in federal custody, under commitment for trial before a lower federal court, and thus, language used in discussing a particular variety of the writ issued in England in certain civil cases would appear to be neither relevant to the issue before the Court nor authoritative on the issue of federal power over state prisoners.[35] Further, as noted above, the Court's discussion of the varieties of the writ, other than the writ *ad subjiciendum*, was made in the context of analyzing a much narrower construction of the statute than was ultimately adopted.[36] It is also interesting to note that under the Court's reasoning on the limitations of the applicability of the writ to prisoners, state prisoners could be brought into federal court to testify by the writ of habeas corpus *ad testificandum*, which issues for a

---

30. *Id.* at 99-101. The limiting language of the original habeas corpus act read as follows:

> *Provided*, That writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify. 1 Stat. 82 (1789).

Judiciary Act, ch. 20, § 4, 1 Stat. 73 (1789).

31. 8 U.S. (4 Cranch) at 97-99.

32. *See, e.g.*, United States *ex rel.* Moses v. Kipp, 232 F.2d 147 (7th Cir. 1956); Lunsford v. Hudspeth, 126 F.2d 653 (10th Cir. 1942).

33. The state courts are not, in any sense of the word, *inferior* courts, except in the particular cases in which an appeal lies from their judgment to this court; and in these cases the mode of proceeding is particularly prescribed, and is not by *habeas corpus*. They are not inferior courts because they emanate from a different authority, and are the creatures of a distinct government.

8 U.S. (4 Cranch) at 97.

34. The prisoners were already in federal custody on charges of treason against the United States. *Id.* at 75.

35. The Court was discussing the writ *ad respondendum* which was used "when a man hath a cause of action against one who is confined by the process of some *inferior* court; in order to remove the prisoner and charge him with this new action in the court above." 8 U.S. (4 Cranch) at 97 (emphasis added).

36. *Id.* at 99.

prisoner whenever he is " 'necessary to be brought into court to testify.' "[37] Thus, any disability of the federal courts in issuing writs of habeas corpus for state prisoners must be of statutory, rather than constitutional, dimensions.

This interpretation is borne out in dicta of *Ex parte Dorr*,[38] which involved a petition for a writ of habeas corpus *ad subjiciendum* on behalf of a state prisoner convicted of high treason against the state of Rhode Island. Interpreting the same proviso limiting habeas corpus for prisoners as did the Court in *Bollman*, the *Dorr* Court held that the writ would not issue for a state prisoner except when necessary to bring him into court to testify.[39] The holding in *Dorr* was legislatively overruled by the Habeas Corpus Act of 1867[40] which empowered the federal courts to issue writs of habeas corpus to inquire into the legality of a state prisoner's confinement under the Constitution and laws of the United States.[41] It would appear that the final bar to issuance of a writ of habeas corpus *ad prosequendum* for state prisoners was removed in 1948 when the habeas corpus statutes were revised. The words "or for trial" were added to the provision permitting issuance of the writ of habeas corpus *ad testificandum*, thus empowering the issuance of the writ *ad prosequendum* for state prisoners.[42]

Despite the apparent availability of the writ of habeas corpus *ad prosequendum* to the federal courts to obtain custody of state prisoners, the courts have principally relied on *Bollman*, *Dorr*, and one other case, similarly inapposite, for the proposition that federal courts cannot interfere with state custody of prisoners. In *Ponzi v. Fessenden*,[43] the Supreme Court was faced

---

37. *Id.* (quoting Judiciary Act ch. 20, § 14, 1 Stat. 73 (1789)). The proviso restricting the use of habeas corpus for prisoners had three exceptions, two limited to federal prisoners and one apparently not so qualified, which is the writ *ad testificandum*. *See* note 30 *supra*.

38. 44 U.S. (3 How.) 103 (1845). *Dorr* is often cited with *Bollman* as limiting federal interference with the states. *See* note 32 *supra*.

39. 44 U.S. (3 How.) at 105. "Neither this nor any other court of the United States, or judge thereof, can issue a *habeas corpus* to bring up a prisoner who is in custody under a sentence or execution of a state court, for any other purpose than to be used as a witness." *Id.*

40. 14 Stat. 385 (1867).

41. The Act is now codified as 28 U.S.C. § 2241(c)(3) (1970).

42. The addition of the words appears to have escaped without comment. *See* Longsdorf, *The Federal Habeas Corpus Acts Original and Amended*, 13 F.R.D. 407, 416 (1953). The plain meaning of the exception to the proviso is that both writs *ad testificandum* and *ad prosequendum* issue under the same terms and conditions. Clearly, the *ad prosequendum* writ now extends to state prisoners, because "[t]here is a presumption against construing a statute as containing superfluous or meaningless words or giving it a construction that would render it ineffective." United States v. Blasius, 397 F.2d 203, 207 n.9 (2d Cir. 1968) (footnotes omitted).

43. 258 U.S. 254 (1922).

with a challenge by a federal prisoner of his temporary transfer to state custody for trial and his subsequent return to federal prison. Chief Justice Taft, in holding that the United States could consent to such a transfer and that it worked no prejudice on the prisoner,[44] stated the essence of the rule of comity: because there often exists concurrent jurisdiction over persons and things in the state and federal systems, the situation requires a "spirit of reciprocal comity and mutual assistance to promote due and orderly procedure."[45] Thus, in the interest of friendly federal-state relations, *Ponzi* stands for the proposition that the governments should cooperate in the enforcement of their laws, and that such cooperation does not affect the rights of any prisoner subject to it.[46]

One final issue, infrequently addressed by the courts in this context, is the relationship between the rule of comity and the supremacy clause of the Federal Constitution.[47] During the late 1800's, several cases which placed in issue the status of state interference in the operation of federal law and judicial process reached the Supreme Court. Although many of the cases arose under the Habeas Corpus Act of 1867[48] and were concerned with the new federal power to inquire into the legality of state confinement,[49] the unmistakable tenor of the decisions was that the judicial power of the United States was within the ambit of the supremacy clause.[50] Thus, in cases of conflict between federal and state authority, at least where direct interference with the operation of federal law or process results, the former should prevail.[51]

---

44. *Id.* at 261-62, 266.

45. *Id.* at 259.

46. *Id.* at 265-66. It is interesting to note that *Ponzi* and the cases just discussed are frequently cited for the proposition that comity will prevent the compelled exercise of federal jurisdiction over state prisoners. *E.g.*, Lunsford v. Hudspeth, 126 F.2d 653, 655 (10th Cir. 1942).

47. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

48. 14 Stat. 385 (1867).

49. *See, e.g.*, Ex parte Royall, 117 U.S. 241 (1886).

50. *See* Ableman v. Booth, 62 U.S. (21 How.) 506 (1858).

51. *See* Tarble's Case, 80 U.S. (13 Wall.) 397 (1871).

Such being the distinct and independent character of the two governments, within their respective spheres of action, it follows that neither can intrude with its judicial process into the domain of the other, except so far as such intrusion may be necessary on the part of the National government to preserve its rightful supremacy in cases of conflict of authority.

Id. at 407.

The Interstate Agreement on Detainers Act[52] does not clarify the issue of the balance between federal and state authority to obtain temporary custody of the other's prisoners for purposes of prosecution. Despite the clear impact of the Agreement on federal-state relations and the administration of criminal justice, the legislative history is, to say the least, sparse and is confined solely to the latter consideration.[53] The Senate Report[54] sets forth two reasons favoring enactment of the Agreement: first, to afford prisoners their speedy trial right, thereby preventing the reversal of cases for its denial,[55] and second, to provide prisoners more certainty as to their future and prison authorities the means to plan more effectively for rehabilitation.[56] Beyond relatively brief statements of the desirability of federal participation in the Agreement based on these considerations, the record is silent on the writ of habeas corpus *ad prosequendum.*

The Agreement was clearly intended to provide cooperative procedures for the states and the federal government to obtain temporary custody of each other's prisoners for prosecution.[57] The Agreement was enacted in response to constitutional and procedural problems which had developed in the detainer system employed by both federal and state prosecutors.[58] The constitutional impetus for the Agreement was the development of the speedy trial right[59] for federal and state prisoners with charges pending against them in jurisdictions other than that in which they were incarcerated.[60] Although the Agreement implements aspects of the speedy trial right as between the prisoner and the indicting jurisdiction, there is as yet no remedy under either the Agreement or the sixth amendment if the imprisoning jurisdiction does

52. 18 U.S.C. app. (1970).

53. *See* note 12 *supra.*

54. S. REP. No. 91-1356, 91st Cong., 2d Sess. (1970).

55. *Id.*

56. *Id.* The Agreement also allows prosecutors to obtain prisoners for trial before their sentences expire and while witnesses are available. *Id.*

57. Congress empowered the states to enter into cooperative compacts for the prevention of crime and the enforcement of their criminal laws in 1934, in what is now codified as 4 U.S.C. § 112(a) (1970).

58. *See* S. REP. No. 91-1356, 91st Cong., 2d Sess. (1970).

59. U.S. CONST. amend. VI.

60. S. REP. No. 91-1356, 91st Cong., 2d Sess. (1970). In Smith v. Hooey, 393 U.S. 374 (1969), the Supreme Court imposed a constitutional duty on an indicting jurisdiction to make a diligent, good faith effort to obtain temporary custody of a prisoner in another jurisdiction for prosecution. In Barker v. Wingo, 407 U.S. 514 (1972), the Supreme Court enunciated a balancing test composed of four factors for evaluating speedy trial claims: the length of the delay, the reason for the delay, the defendant's assertion of the right, and prejudice to the defendant. 407 U.S. at 530. The Court has not addressed how the speedy trial test would be affected if the defendant were imprisoned in a foreign jurisdiction.

not cooperate in bringing the prisoner to trial.[61] The procedural problems concerned prisoner morale and rehabilitation traditionally associated with detainers outstanding against prisoners.[62] A prisoner with an outstanding detainer would often be held in close custody, ineligible for trustee status, prison work programs, or work release programs, and less likely to be paroled.[63] The uncertainty engendered by the detainer was also often reflected in the prisoner's attitude toward any programs which were available to him.[64]

The Agreement, with certain limitations,[65] operates to mitigate these adverse effects by providing procedures whereby an indicting state can obtain custody of a prisoner in another jurisdiction, while requiring that the prisoner be notified of detainers and allowed to demand disposition of the underlying charges.[66] In either case, the Agreement imposes time limits within which

---

61. In May v. Georgia, 409 F.2d 203 (5th Cir. 1969), however, the court indicated that some action may be taken against the imprisoning jurisdiction if its actions threatened speedy trial rights of its prisoner. The court stated that should the imprisoning state refuse to deliver a prisoner to the indicting state, "the federal courts would be open to test the rightfulness of such action since it would tend to interfere with [the prisoner's] Sixth Amendment rights." *Id.* at 205 n.5. *See also* Note, *Extending the Smith v. Hooey Duty to the Holding Jurisdiction*, 23 ME. L. REV. 201 (1971).

However, the courts have generally found delay justified because the prisoner assisted or acquiesced in it, or was not prejudiced by it. *See, e.g.*, United States v. Jackson, 508 F.2d 1001 (7th Cir. 1975); United States v. Perez, 489 F.2d 51 (5th Cir. 1973), *cert. denied*, 417 U.S. 945 (1974); United States v. Jones, 475 F.2d 322 (D.C. Cir. 1972).

Even if the facts of the case will not justify application of the *Barker* speedy trial balancing test, *supra* note 60, the due process right to a fair trial may nonetheless require dismissal of the charges. *See* United States v. Marion, 404 U.S. 307 (1971). For more in-depth treatment of the speedy trial rights of prisoners, *see* Walther, *Detainer Warrants and the Speedy Trial Provision*, 46 MARQ. L. REV. 423 (1963); Comment, *The Detainer System and the Right to a Speedy Trial*, 31 U. CHI. L. REV. 535 (1964); Note, *The Interstate Criminal Detainer and the Sixth Amendment*, 23 ARK. L. REV. 634 (1970); Note, *Convicts—The Right to a Speedy Trial and the New Detainer Statutes*, 18 RUTGERS L. REV. 828, 835 (1964).

62. *See, e.g.*, Note, *Convicts—The Right to a Speedy Trial and the New Detainer Statutes*, 18 RUTGERS L. REV. 828 (1964).

63. *Id.* at 835-36.

64. *Id.* at 836. It has been estimated that as many as 50% of all detainers filed were never acted on. *Id.* at 835 n.59.

65. The Agreement operates only on untried charges based on indictments, informations and complaints. 18 U.S.C. app. § 2, arts. I, III, IV (1970). Detainers, however, have often been filed merely because the prisoner is wanted for questioning, or just to harass the prisoner. *See* Note, *The Interstate Criminal Detainer and the Sixth Amendment*, 23 ARK. L. REV. 634, 635 (1970). The Agreement has not been enacted by, and is thus inapplicable to, Alabama, Alaska, Mississippi and Oklahoma. *See* note 15 *supra*.

66. 18 U.S.C. app. § 2, arts. III, IV (1970).

the prisoner must be tried after his arrival in the indicting jurisdiction.[67] In addition, the prisoner cannot be returned to the state of his original imprisonment without first being tried on the charges on which the detainer was based.[68] Failure to comply with any of these restrictions results in dismissal of the charges with prejudice.[69]

The federal cases which have considered the relationship of the writ of habeas corpus *ad prosequendum* and the Agreement since the latter's enactment have done nothing to resolve the problems discussed above.[70] In *United States v. Ricketson*[71] the defendant was confined in an Illinois prison when he was indicted by federal authorities. On three separate occasions prior to the filing of a detainer with the state authorities, the defendant was transferred to the federal district court for proceedings and then returned to state custody.[72] The defendant moved to dismiss the indictment on the basis of article III(d) of the Agreement.[73] The Seventh Circuit, however, held that since all of the transfers occurred prior to the filing of the detainer, the Agreement was inapplicable.[74] Although the court was not explicit in this regard, it apparently considered the threshold question to be whether a detainer had been filed and reasoned that anything occurring prior to such filing could not be governed by the Agreement.[75] The court did not discuss what constituted a detainer.

While *Ricketson* dealt with federal writs issued prior to the filing of a detainer, *United States ex rel. Esola v. Groomes*[76] dealt with state writs issued without filing a detainer. In *Esola*, the Court of Appeals for the Third Circuit expressly declined to follow the reasoning of *Ricketson*.[77] While in federal prison, the defendant was transferred on at least four separate occasions to the state court and returned to federal prison. At least one of these trans-

67. These limits are 120 days when the transfer is initiated by the state, *Id.* § 2, art. IV(c); and 180 days when the transfer is initiated by the prisoner. *Id.* § 2, art. III(a).

68. *Id.* § 2, arts. III(d), IV(e).

69. *Id.* § 2, art. V(c).

70. The state cases that have faced the issue generally follow the federal cases. *See, e.g.*, Hoss v. State, 266 Md. 136, 292 A.2d 48 (1972).

71. 498 F.2d 367 (7th Cir.), *cert. denied*, 419 U.S. 965 (1974).

72. 498 F.2d at 373. The detainer was filed on August 22, 1972; the transfers occurred in March, May and July, 1972, for arraignment, pre-trial motions and a deposition. *Id.* at 372-73.

73. *Id.*

74. 498 F.2d at 373.

75. *Id.* The court indicated that it was willing to treat the writs as requests for custody under the Agreement, but gave no indication that it considered the writ the equivalent of a detainer.

76. 520 F.2d 830 (3rd Cir. 1975).

77. *Id.* at 838 n.23.

fers was effected by a state writ of habeas corpus *ad prosequendum*, and it appeared from the court's discussion of the government's arguments that no detainer had ever been filed with the federal authorities.[78] The basis of the defendant's appeal was the same as that in *Ricketson*—his return to the original incarcerating jurisdiction without trial. Although discussing detainers in another context,[79] but without discussing any similarities or differences in form or substance between detainers and writs of habeas corpus the court stated that to permit multiple transfers would render the Agreement meaningless, because its sanctions could then be circumvented by the writ. The court held that whenever the Agreement was available, it was the exclusive means for effecting a transfer.[80]

In *United States v. Sorrell*,[81] the District Court for the Eastern District of Pennsylvania ignored the possibility of an easy reconciliation with *Ricketson* and elected instead to follow the *Esola* reasoning. *Sorrell* involved transfers of a state prisoner by writs of habeas corpus *ad prosequendum* after the filing of a detainer, which were precisely the circumstances in which *Ricketson* indicated that the writ might be treated as a request for custody under the Agreement.[82] Nonetheless, citing *Esola* as authority, and briefly discussing the policies supporting the Agreement, the *Sorrell* court held that the Agreement was the exclusive means of transfer for prosecution when it was available[83] and did not discuss the relationship between the writ and detainers.

II. *Mauro* AND STATE INTERFERENCE WITH FEDERAL PROSECUTIONS

The *Mauro* court gave short shrift to prior case and statutory law. Apparently following the lead of the *Esola* and *Sorrell* cases, it examined the purposes and policies supporting the Agreement and ruled so as to futher those policies. Although *Mauro* will certainly further the rehabilitative, morale, and speedy trial considerations of the Agreement,[84] its ruling that detainers and writs of habeas corpus *ad prosequendum* are equivalent may not have

78. *Id.* at 832, 836.

79. The court was addressing the question whether a detainer could be filed when the accused was on bail from the requesting jurisdiction. *Id.* at 838.

80. *Id.* at 837. In reaching its conclusion the court noted that the Agreement was remedial and hence should be liberally construed in favor of those it was intended to aid. *Id.* at 836. The Agreement itself states, "[t]his agreement shall be liberally construed so as to effectuate its purposes." 18 U.S.C. app. § 2, art. IX (1970).

81. 413 F. Supp. 138 (E.D. Pa. 1976).

82. 498 F.2d at 373.

83. 413 F. Supp. at 140.

84. *See* notes 13, 14 & accompanying text *supra*.

been necessary to protect those concerns. The court could have held simply that the Agreement must be utilized when it is available, and that if other means of transferring prisoner custody are employed when available, the transfers will be deemed to have been made subject to the Agreement's prohibitions and sanctions.[85] As it stands, the *Mauro* holding could be interpreted as a judicial repeal of the writ of habeas corpus *ad prosequendum*.[86]

In equating writs of habeas corpus *ad prosequendum* and detainers on policy grounds, the *Mauro* court very briefly discussed the operation of both.[87] Essentially repeating the language of the Senate Report, the court stated that a detainer is a notification filed with prison authorities that there are criminal charges in another jurisdication pending against a prisoner.[88] Prior to the Agreement, detainers operated very informally and were often nothing more than requests to be informed of the anticipated release date of the prisoner.[89] The *Mauro* court took the position that a writ of habeas corpus *ad prosequendum* is merely a request for custody since its operation depends on the cooperation of the incarcerating juris-

85. This would appear to have been Judge Mansfield's position in his dissent in *Mauro*. *See* 544 F.2d at 597.

86. Briefly discussing the problem of a judicial repeal of the writ *ad prosequendum*, the *Mauro* court noted that because not all states were parties to the Agreement, the writ must still be available for those states, and thus was not repealed as to those states. *Id.* at 594. The plain implication of this comment is that the writ is not available with respect to states which are parties to the Agreement. Further, if and when all states are parties to the Agreement, under the *Mauro* court's reasoning, the writ *ad prosequendum* could no longer be used, since it has no force beyond that of a detainer.

In a recent decision, the Fifth Circuit has expressly declined to follow either the holding or the reasoning of *Mauro*. In United States v. Scallion, 584 F.2d 1168 (5th Cir. 1977), the United States Court of Appeals for the Fifth Circuit characterized the holding of *Mauro* as an implied repeal of the federal writ of habeas corpus *ad prosequendum*, finding it incredible to conclude that the writ of habeas corpus was contemplated by the Agreement when it was never mentioned in the legislative history or the Agreement. 584 F.2d at 1173. The *Scallion* court devoted extensive discussion to the very same factors raised in support of the *Mauro* decision to reach the opposite conclusion, and this despite the court's recognition of a procedural defect by which the court could have avoided the question altogether. The court did not, however, decide the issue of the effect of the writ of habeas corpus on a recalcitrant state authority. Thus, alhtough the procedural issue may for the present avoid the existence of a true conflict between the circuits, the Fifth Circuit has clearly rejected the position that the Agreement is the exclusive method for transfer of prisoners for federal prosecution and set the stage for ultimate resolution of the issue by the Supreme Court.

87. *Id.* at 591.

88. *Id.*

89. *See* Note, *The Interstate Criminal Detainer and the Sixth Amendment*, 23 ARK. L. REV. 634, 634-35 (1970).

diction.[90] Even accepting this position, apparently drawn from the line of cases which states that the writ operates only by the grace of comity,[91] it does not appear that the writ is the equivalent of a detainer. As pointed out by the dissent in *Mauro*, at no time does the writ operate as a detainer.[92] It commands the production of a prisoner before the court, it is executed immediately, and when its purpose has been served, the prisoner is returned to the state and the writ is discharged.[93] At no point does it serve merely as notification of the existence of pending charges.

The *Mauro* court's acceptance of the comity doctrine was accomplished with virtually no discussion. The court failed to note that the Supreme Court in its most recent treatment of the writ *ad prosequendum* expressly reserved decision on the issue of the writ's effect on an uncooperative state, although it did reaffirm the policies of the comity doctrine.[94] The *Mauro* court's holding appears to accept as well-settled precisely the same issue which the Supreme Court failed to decide. Since a resolution of the issue was not necessary to reach the result in *Mauro*, it would seem at best improvident of the court to have even impliedly resolved the issue by equating detainers and writs of habeas corpus *ad prosequendum*.

The clear implication of the Supreme Court's reservation on the issue is that, although comity should be resorted to first, if that fails, the federal courts may still have further recourse. From the foregoing discussion of writs of habeas corpus,[95] it is evident that this position must remain an open one, at least until the Court rules directly on the issue.[96] As that analysis attempted to show, there does not appear to be either a constitutional or statutory bar to the enforcement of the writ, and the line of authority advocating the contrary can hardly be viewed as binding precedent. Rather, there would appear to be substantial authority for the position that the writ can be enforced against the states if constitutional or federal rights are interfered with and if the federal interest is substantial.[97] The *Mauro* holding that the

90. 544 F.2d at 592.

91. *See, e.g.*, Lunsford v. Hudspeth, 126 F.2d 653 (10th Cir. 1942).

92. 544 F.2d at 595-96.

93. *Id.*

94. Carbo v. United States, 364 U.S. 611 (1961). *Carbo* addressed the issue of the territorial limits of a federal court's jurisdiction to issue the writ *ad prosequendum*. Briefly discussing the comity doctrine, the Court stated, "[i]n view of the cooperation extended by the New York authorities in honoring the writ, it is unnecessary to decide what would be the effect of a similar writ absent such cooperation." *Id.* at 621 n.20.

95. *See* notes 23-51 & accompanying text, *supra*.

96. As pointed out by the *Mauro* dissent, this point has never been squarely before a federal court. 544 F.2d at 596.

97. Ableman v. Booth, 62 U.S. (21 How.) 506 (1858); Tarble's Case, 80 U.S. (13

writ and detainers are equivalent is entirely inconsistent with this possibility. Within the limits of the Agreement, the imprisoning jurisdiction is granted wide latitude as to whether it will comply with a request for custody after a detainer is filed.[98] Even where the Agreement would appear to permit no discretion,[99] the few cases that have faced the issue have held that there is no remedy within the Agreement against the imprisoning jurisdiction for noncompliance.[100] Thus, whatever the ultimate status of the comity doctrine, the writ of habeas corpus *ad prosequendum* clearly does not operate as a detainer, even under the Agreement. The language and effect of the *Mauro* court's holding that the writ and detainers are equivalent amounts to a judicial repeal of the *ad prosequendum* section of the habeas corpus empowering statute. That it was reached by inference and implication without examination of underlying policies does not mitigate the possibility that the court may ultimately have to repudiate the plain meaning of that holding.[101] The policy considerations of the comity doctrine, though important to our federal system, are not so important that they justify an unreasoned rejection of possible countervailing factors.

As noted by the dissent in *Mauro*,[102] a federal-state confrontation raising this issue has not yet come before the federal courts,[103] and thus the literal implication of the court's language may appear to be of little moment. However, the establishment of the speedy trial right as fundamental to due process and the promulgation of standards to enforce it over the last decade have increased the possibility of a situation arising which would be beyond solubility by the comity doctrine. The speedy trial right has been clearly secured for prisoners vis-à-vis the indicting jurisdiction;[104] but no corresponding right

---

Wall) 397 (1871). "It is an exceedingly delicate jurisdiction given to the Federal courts [so that u]nless this case be of such an exceptional nature, we ought not to encourage the interference of the Federal court below with the regular course of justice in the state court." United States *ex rel.* Drury v. Lewis, 200 U.S. 1, 7 (1906) (quoting Baker v. Grice, 169 U.S. 284, 291 (1898)).

98. 18 U.S.C. app. § 2, art. I (1970).

99. *E.g.*, forwarding the prisoner's demand for disposition of the charges underlying a detainer. *Id.* § 2, art. II(b).

100. *See, e.g.*, Davidson v. State, 18 Md. App. 61, 305 A.2d 474 (1973).

101. "Where Congress has expressly legislated in respect to a given matter that express legislation must control, in the absence of subsequent legislation equally express, and is not overthrown by any inferences or implications to be found in such subsequent legislation." Rosenkranz v. United States, 165 U.S. 257, 262 (1897).

102. 544 F.2d at 596.

103. State and federal prosecutors apparently try to work out any conflicts regarding their needs for the other's prisoners. *See* United States v. Oliver, 523 F.2d 253, 259 (2d Cir. 1975).

104. Smith v. Hooey, 393 U.S. 374 (1969).

has been established to protect speedy trial rights from the action, or inaction, of the imprisoning jurisdiction. Although the Agreement was designed in part to provide procedures to vindicate some of these rights, those procedures are expressly cooperative,[105] and there is no remedy for noncompliance by an imprisoning state. While no federal court has yet dismissed an indictment for delays occasioned by an imprisoning state, the possibility plainly exists.[106] Whether grounded in the right to a speedy trial or the due process right to a fair trial,[107] an unreasonable delay in trying a prisoner should result in dismissal of the charges so long as the prisoner did not contribute to the delay.[108] In addition to possibly violating an individual's rights, a state's refusal to surrender temporary custody of a prisoner pursuant to a request under the Agreement by federal authorities would interfere with the operation and enforcement of federal law. If the Agreement were the sole recourse for the federal government, the states would be free to frustrate what may be a substantial federal interest. Certainly, the federal government does not have a substantial interest in prosecuting all state prisoners against whom it has indictments. But adherence to the holding of *Mauro* would render futile even a case-by-case inquiry into the nature of the federal interest. Having equated detainers with the writ of habeas corpus *ad prosequendum*, the *Mauro* court must either accept that the unavailability of the writ as an alternative for vindicating a federal interest when the procedures of the Agreement have failed, or it must reject its own holding. As already noted[109] there is precedent for federal intervention when state action interferes with substantial federal interests. *Mauro* unnecessarily undercuts a "traditional and time-honored"[110] method which could vindicate those interests.

III. CONCLUSION

The problem with *Mauro* is that it presumes too much and explains too little. Without discussion, and apparently with little examination, the court has created precedent for a position which, upon closer examination, may need to be rejected. *Mauro* has reduced an uncertain body of law to the

105. 18 U.S.C. app. § 2, art. I (1970).

106. *See* United States v. Ricketson, 498 F.2d 367, 372-73 (7th Cir.), *cert. denied*, 419 U.S. 965 (1974); United States v. Cabral, 475 F.2d 715, 720 (1st Cir. 1973); United States v. Taddeo, 434 F.2d 228, 229 (2d Cir.), *cert. denied*, 401 U.S. 944 (1970). These cases concerned delays occasioned by federal prosecutors.

107. United States v. Marion, 404 U.S. 307 (1971).

108. Strunk v. United States, 412 U.S. 434 (1973).

109. Ableman v. Booth, 62 U.S. (21 How.) 506 (1858); Tarble's Case, 80 U.S. (13 Wall) 397 (1871).

110. 544 F.2d at 591.

maxim that a writ of habeas corpus *ad prosequendum* is a detainer. The court was undoubtedly correct in attempting to limit the ability of parties to the Agreement to circumvent its purposes and sanctions. Such remedial legislation deserves to be construed according to substance rather than form. The Agreement is limited, however, both in purpose and procedure, and courts should carefully examine the impact of their holdings before extending them unnecessarily. Until the Supreme Court resolves the remaining problems both with the Agreement and in the speedy trial area, *Mauro* has left the writ of habeas corpus *ad prosequendum* an uneasy presence in our legal system.

F. John Oshoway